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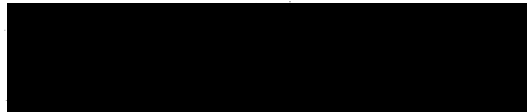


U.S. Citizenship
and Immigration
Services



FILE: WAC 03 083 53576 Office: CALIFORNIA SERVICE CENTER Date:

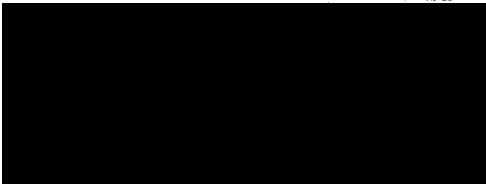
IN RE: Petitioner:
Beneficiary:



NOV 29 2004

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour, which equals \$31,300 per year.

On the petition, the petitioner stated that it was established during 1995 and that it employs one worker. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, the petitioner submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on May 21, 2003, the California Service Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted copies of its 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns. The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,544 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$5,324 and current liabilities of \$1,388, which yields net current assets of \$3,936.

The 2002 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,429 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$18,172 and current liabilities of \$3,911, which yields net current assets of \$14,261.

The petitioner provided a copy of its unaudited financial statements from June 30, 2003, a copy of the personal joint bank account of the petitioner's owner and owner's spouse; and the 2001 and 2002 joint Form 1040 U.S. Individual Income Tax Return of that same couple including 2001 and 2002 W-2 forms showing wage payments the petitioner made to its owner during those years.

The Director, California Service Center determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 1, 2003, denied the petition. The director noted that evidence of the personal income and assets of a corporation's owners or stockholders cannot be considered in the determination of that company's ability to pay the proffered wage.

On appeal, counsel argues that the petitioner's gross receipts, its total income, and the petitioner's owner's bank balances during various years demonstrate the petitioner's ability to pay the proffered wage. Counsel further states,

... [I]t is well settled and a given under all financial markets that a closely held corporation such as the Petitioner's which has one owner, one officer, and one stockholder certainly establishes a different obligation and commitment than that of a large public corporation. The assets, finances and savings of the individually owned corporation is (sic) indistinguishable between the corporate entity and the owner. In every instance, the individual owner presents to all potential vendors, creditors or obligees that he is the individual owner-ready, (sic) willing and able to back up and support all the obligations and debts of his solely owned corporation.

Counsel offers no authority for that assertion nor is this office aware of any. Counsel does submit a copy of the petitioner's owner's and owner's spouse's bank statement for another month.

Finally, counsel submits the minutes of a special meeting of the petitioner's board of directors on March 20, 2001. The petitioner's owner, the only member of the board, offered at that meeting to become personally responsible for the petitioner's obligations, including payroll.

Whether that resolution, while standing, is binding on the petitioner's owner is unclear. That the petitioner's owner might repeal it without the consent of anyone else, however, is obvious. For that reason, the corporate

resolution cannot possibly bind the petitioner's owner to pay the debts and obligations of the corporation against his will.

The petitioner is a corporation. A corporation, whether or not closely-held, is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel's reliance on the petitioner's gross receipts and total income is misplaced. The petitioner must show the ability to pay the proffered wage out of its net income. Showing that the petitioner's gross receipts, or some interim statistic, exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net income,² the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. On a Form 1120 U.S. Corporation Income Tax Return, that net income is shown as taxable income before net operating loss deduction and special deductions.

Counsel's reliance on the bank statements in this case is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the bank statements submitted in this matter show the personal assets of the petitioner's owner and owner's spouse, not the assets of the petitioner itself.

Counsel's reliance on unaudited financial records is, again, misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by

¹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

² The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is March 27, 2001. The priority date is \$31,300.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,544. That amount is insufficient to pay the proffered wage. The petitioner ended that year with net current assets of \$3,936. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$3,429. That amount is insufficient to pay the proffered wage. The petitioner ended that year with net current assets of \$14,261. That amount is also insufficient to pay the proffered wage. The petitioner

has not demonstrated that any other funds were available to it during that year with which it might have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.